U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11283618

Date: APR. 16, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a bioinformatics specialist, seeks classification as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner qualifies for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

The Petitioner filed a combined motion to reopen and reconsider the Director's decision. The Director summarily denied both motions, stating that the Petitioner "neither stated new facts supported by additional evidence nor provided pertinent precedent decisions to consider, establishing that the decision was incorrect based upon the evidence of record at the time."

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for the entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, USCIS may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

The Director denied the petition on January 9, 2020. The Petitioner filed its combined motion with the Nebraska Service Center on February 4, 2020. The Director issued the second decision on March 9, 2020.

On appeal, the Petitioner states: "A final decision was issued on March 9, 2020, denying [the] petition . . . on the basis that the petitioner had failed to establish that his endeavor is in the National Interest." This wording does not accurately describe the March 2020 decision, which did not address the merits of the petition, but instead rested solely on the determination that the Petitioner's February 2020 filing did not meet the requirements of a motion to reopen or a motion to reconsider.

The Petitioner states: "As the appeal is a De Novo Review, we will focus on the facts of the case as opposed to the legal shortcomings of the decision." While *de novo* review allows us to consider issues without deference to the Director's underlying decision, the appeal cannot simply disregard that decision. The appellant must specifically identify specifically erroneous conclusions of law or statements of fact as a basis for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

In order to appeal the January 2020 merits decision directly to us, the Petitioner had to file an appeal no later than February 11, 2020.[1] The Petitioner did not file an appeal during that period. The March 2020 decision did not reset the clock for a timely appeal of the January 2020 decision, and the merits of the underlying petition are not properly before us for appellate review.

The Petitioner does not directly or specifically contest the denial of the motion to reopen. Most of the documents submitted with that motion are copies of previously submitted materials (such as letters), which introduced no new facts. The new exhibits consist primarily of background information about diabetes rather than facts specific to the petition. On appeal, the Petitioner does not specify what new facts accompanied the motion, as required by the regulation at 8 C.F.R. § 103.5(a)(2). We conclude that the Director properly dismissed the motion to reopen. But the motion to reconsider requires further action.

Although the Petitioner's appeal contains little direct discussion of the Director's March 2020 decision, the appeal does include the assertion that the March 2020 decision "is devoid of any . . . analysis of the legal arguments put forward in the motion." Legal arguments would fall within a motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

In this instance, contrary to the Director's determination, the Petitioner did cite a precedent decision on motion, specifically *Matter of Dhanasar*. (The Petitioner also cited an unpublished appellate decision that has no binding precedential authority.) The motion also included a lengthy argument as to why the January 2020 decision was incorrect based on the evidence of record at the time of that decision. Initial review of this argument resides with the Director, not with the Administrative Appeals Office.

Because the Director has not yet addressed the merits of the February 2020 motion to reconsider, the proceeding is not ripe for us to consider the Petitioner's arguments in that motion. The Director must at least address the Petitioner's claims and explain why they are deficient.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[1] *See* 8 C.F.R. §§ 103.3(a)(2)(i) and 103.8(b).